No. 11,545

IN THE

United States Court of Appeals

For the Ninth Circuit

Z. E. EAGLESTON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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Subject Index

Page

The trial court, in giving instruction 4D, wrongfully assumed controverted facts 2

Instruction No. 4 2

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To the Honorable William Denman, Presiding Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now Z. E. Eagleston, appellant above named, and respectfully petitions that the decision of this Court, rendered herein on the 7th day of January, 1949, be set aside and a rehearing of the cause be granted on the following grounds, to-wit:

In rendering its opinion and decision, this Court overlooked two vital and material points raised by appellant:

1. That the trial court's Instruction 4D wrongfully assumed that appellant had committed an assault upon Rowley and that appellant attempted to hit and injure Rowley with his fists, whereas these material facts were in issue, controverted and disputed and were matters to be determined by the jury (appellant's opening brief, p. 15).

2. That the trial court erred in giving to the jury Instruction No. 4 wherein the Court disclosed to the jury the lesser punishment which might be imposed by the Court for a violation of the included offense of assault, and failed to indicate to the jury the greater punishment provided for the crime charged in the indictment, to-wit, assault with a dangerous weapon (appellant's opening brief, p. 21).

THE TRIAL COURT, IN GIVING INSTRUCTION 4D, WRONGFULLY ASSUMED CONTROVERTED FACTS.

As pointed out in our opening brief (pages 15 to 20, inclusive) in giving Instruction 4D, the trial court in effect stated to the jury that *appellant committed an assault upon Rowley and attempted to hit and injure Rowley with his fists.*

The Court's assumption is contained in the following language:

> "Even if you should believe that Rowley called the defendant a liar * * * the use of such words by Rowley * * * *would not justify an assault by the defendant upon Rowley.*" (Italics ours.)

> "It is no defense to the crime charged * * * that Rowley may have voluntarily entered into a fight with the defendant, *each* attempting to hit and injure the other with his fists." (Italics ours.) (Instruction 4D T. R. 11.)

We discussed this point in our brief under the heading "First Point Raised: 1. That the trial court erred in giving to the jury Instruction No. 4D" (appellant's opening brief, p. 12).

The first portion of the argument on this point was devoted to a discussion of another point raised by appellant, namely, "By giving said instruction to the jury, the trial court erroneously deprived appellant of the right to present to the jury his theory of defense and to have the jury consider appropriately in connection therewith the vital matter of self-defense." We discussed this question of self-defense on pages 13 to 15 of our brief under subheading (a). We took up the additional discussion of the trial court's wrongful assumption of material facts in issue on pages 15 to 20, inclusive, in our brief under subheading (b).

In its opinion (page 6), this Court said:

> "A general criticism of 4-D is that it assumes on its face that appellant was the aggressor. The specific reason here assigned is that in giving this instruction the court *completely removed the issue of self-defense.*"

In the opinion the Court then considers in detail the issue of self-defense raised and discussed under subdivision (a). However, nowhere in the opinion is

any mention made of the point raised under subdivision (b) dealing with the trial court's wrongful assumption of material facts in issue. We cited numerous authorities to substantiate our position on this vital point, including a review of the cogent portions of the instructions and opinions in these cases in the appendix to our opening brief.

In omitting any mention of this point or the cases cited, we are unable to determine whether this Court intentionally or inadvertently omitted the same or considered it in any way in arriving at its decision.

INSTRUCTION NO. 4.

We discussed this vital point of appeal in our opening brief at pages 21 to 24 under heading "Second Point Raised". We contended that this instruction given by the trial court could easily have induced the jury to render a verdict of guilty of the crime charged in the indictment in the belief and on the assumption that the Court would impose the lesser punishment disclosed in the instruction, and that, as a matter of fact, the Court, on conviction, meted out the greater punishment which had not been disclosed to the jury.

We can find no mention of or reference to this point or the cases cited thereunder in this Court's opinion. Again, we are unable to ascertain whether this Court intentionally or inadvertently omitted the

same or considered it in any way in arriving at its decision.

For the foregoing reasons we respectfully submit that a rehearing be granted.

Dated, San Francisco, California,
February 2, 1949.

Respectfully submitted,
GEORGE T. DAVIS,
SOL A. ABRAMS,
ANTHONY E. O'BRIEN,
Attorneys for Appellant and Petitioner.

Certificate of Counsel.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
February 2, 1949.

Sol A. Abrams,
Of Counsel for Appellant and Petitioner.